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No. 94-1457

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

DECELL & ASSOCIATES, INC., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the district court was correct in dismissing petitioner's suit against the Federal Deposit Insurance Corporation (FDIC) for deposit insurance on the ground that petitioner had failed first to present that claim for resolution to the FDIC in its corporate capacity, as insurer of deposits.

2. Whether, by intervening in a state court lawsuit brought against a failed bank by an assignee of a dishonored letter of credit and removing that suit to federal court, the FDIC, in its capacity as receiver for the failed bank, waived the requirement that the assignee file a proof of claim with the FDIC in its corporate capacity.

3. Whether petitioner's due process challenge to the FDIC's informal deposit insurance claim resolution procedures was premature, in light of the fact that petitioner had not yet availed itself of those procedures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 36 F.3d 464. The opinion of the district court (Pet. App. 42a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1994. A petition for rehearing was denied on December 2, 1994. Pet. App. 40a-41a. The petition for a writ of certiorari was filed on March 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is in the business of buying and selling oil field drill pipe and related products. In April, 1986, JRL International and Associates (JRL) ordered drill collar bits from petitioner, instructing petitioner to ship the bits to a Mexican company, Perforaciones Marinas Del Golfo, S.A. (Permargo). Before it would act on that order, petitioner required a letter of credit. Accordingly, on March 24, 1986, Guaranty Bank, a state-chartered bank located in Dallas, Texas, issued a $250,000 standby letter of credit on the account of Permargo in favor of JRL. After JRL endorsed the letter of credit over to petitioner, petitioner shipped the drill collar bits to Permargo. When petitioner presented the letter of credit to Guaranty, however, Guaranty refused to make payment, stating that the assignment from JRL to petitioner was invalid. Pet. App. 2a-3a, 42a-43a.

2. On August 13, 1986, petitioner filed suit in state court against JRL and Guaranty, claiming that Guaranty was liable for wrongfully failing to honor the letter of credit.[1] On June 3, 1988, while the case was pending in state court, Guaranty failed, and the Banking Commissioner of Texas appointed the Federal Deposit Insurance Corporation (FDIC) as receiver (FDIC-Receiver). FDIC-Receiver intervened as a defendant in the state court action in place of Guaranty, and removed the case to federal district court under 12 U.S.C. 1819(b)(2)(B) (Supp. V

[1] On February 7, 1992, petitioner and JRL filed a stipulation for entry of judgment against JRL in favor of petitioner. The action then proceeded against FDIC-Receiver on petitioner's wrongful dishonor claim. Pet. App. 5a.

1993). Pet. App. 3a-4a. In its answer to petitioner's complaint, FDIC-Receiver asserted, among other things, that any recovery against the receivership estate on the basis of the standby letter of credit was limited to a pro rata distribution of the remaining assets of the estate, if any. *Id.* at 26a.

In pre-trial proceedings in October, 1991, petitioner asserted for the first time that it was an insured depositor with respect to the letter of credit. Pet. App. 26a. FDIC-Receiver argued in response (1) that petitioner had not raised a deposit insurance claim in its pleadings, (2) that the district court had no subject matter jurisdiction over the deposit insurance claim, and (3) that FDIC-Receiver was not a proper defendant with respect to the deposit insurance claim, because the FDIC is authorized to make payment on such claims only in its corporate capacity. *Ibid.* See also *id.* at 4a-5a.

Following a bench trial on whether Guaranty had improperly failed to honor the standby letter of credit, but prior to judgment, the presiding magistrate judge sua sponte ordered a new trial and required petitioner to amend its pleadings to join FDIC-Corporate, based on her determination that FDIC-Corporate was an indispensable party to petitioner's claim for deposit insurance. The magistrate judge ruled, however, that the district court did have subject matter jurisdiction to determine whether the letter of credit was an insured deposit. Pet. App. 6a.

FDIC-Receiver filed a motion for reconsideration, arguing that no court has jurisdiction over a deposit insurance claim until the party making the claim for deposit insurance has filed a claim with FDIC-Corporate, and FDIC-Corporate has made a final determination not to pay in full the amount claimed.

Pet. App. 6a. After the magistrate judge denied that motion, FDIC-Receiver filed a supplemental motion for reconsideration. FDIC-Corporate (which had by then been joined by petitioner as a party defendant) moved to dismiss on the same jurisdictional grounds, and withdrew its consent to proceed before the magistrate judge. *Id.* at 6a-7a. At that point, the district court ordered the parties to file cross-motions for summary judgment. *Id.* at 7a.

On January 4, 1994, the district court dismissed petitioner's claims against FDIC-Receiver and FDIC-Corporate for lack of subject matter jurisdiction. The court concluded that petitioner was required first to file a claim for deposit insurance with FDIC-Corporate, and that jurisdiction to review FDIC-Corporate's determination would reside solely in the court of appeals. Pet. App. 7a-8a, 48a-49a.

3. The court of appeals affirmed. Pet. App. 1a-39a. Noting petitioner's concession that it had never presented a deposit insurance claim to FDIC-Corporate, the court found that FDIC-Corporate had been afforded no opportunity to make a "final determination" on the status of petitioner's standby letter of credit as an insured deposit, and concluded for that reason that the case was not yet ripe for judicial review. *Id.* at 16a, citing *Aztec General Agency* v. *FDIC*, No. 93-1424 (5th Cir. Feb. 7, 1994), slip op. 6. Moreover, the court held that even if petitioner had made a claim against FDIC-Corporate, and FDIC-Corporate had made a final determination denying coverage, review would lie in the court of appeals, not in the district court. Pet. App. 16a-18a, citing *Aztec*, slip op. 7; *Kershaw* v. *RTC*, 987 F.2d 1206, 1208 (5th Cir. 1993); *Nimon* v. *RTC*, 975 F.2d 240, 243-244 (5th Cir. 1992).

The court of appeals rejected petitioner's argument that when FDIC-Receiver intervened in the state court lawsuit without expressly limiting its appearance to that of receiver, it waived FDIC-Corporate's right to argue that it had never been presented with, and that it was unaware of, the deposit insurance claim. Pet. App. 18a-27a. The court held that there was no need for FDIC-Receiver expressly to designate itself as separate from FDIC-Corporate, because the FDIC operates in two separate and legally distinct capacities, each with very different responsibilities. *Id.* at 20a-23a, citing *Aztec*, slip op. 2, n.1 ("FDIC-Receiver and FDIC-Corporate are distinct legal entities."); *Texas Am. Bancshares, Inc.* v. *Clarke*, 954 F.2d 329, 335 (5th Cir. 1992) ("The separateness of these dual identities of the FDIC has been well respected by federal courts."); *FDIC* v. *Condit*, 861 F.2d 853, 854, 857 (5th Cir. 1988) (FDIC wears two "hats" and it is the burden of the litigants to define their adversaries). Because FDIC-Receiver and FDIC-Corporate are distinct legal entities, the court concluded that FDIC-Receiver's intervention (in pleadings that made clear its receiver status)[2] could not be interpreted as a waiver by FDIC-Corporate of its right to require presentation of the deposit insurance claim. *Ibid.*

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[2] The court also disagreed with petitioner's argument that FDIC-Corporate must have intervened because only FDIC-Corporate could have removed the case to federal district court under Section 1819. Pet. App. 24a n.6. Although the court acknowledged that in some circumstances FDIC-Receiver is not permitted to remove, the court found removal by FDIC-Receiver proper in this case because of the federal issues raised by petitioner's suit. *Id.* at 25a n.6.

The court of appeals found equally unavailing petitioner's argument that FDIC-Corporate had waived its right to insist upon presentation of a deposit insurance claim because it failed to raise that objection in a timely manner. The record made clear, in the court's view, that both FDIC-Receiver and FDIC-Corporate raised their jurisdictional challenges as soon as petitioner raised his claim that the letter of credit was an insured deposit. Pet. App. 25a-26a. Moreover, because FDIC-Corporate steadfastly disputed the district court's jurisdiction, the court rejected petitioner's contention that the FDIC had effectively designated the district court to resolve the deposit insurance claim. *Id.* at 29a-30a.

Finally, the court rejected as premature petitioner's argument that the FDIC's informal claims resolution process violated petitioner's right to procedural due process. Pet. App. 31a-38a. The court noted that the Fifth Circuit had previously upheld the constitutional sufficiency of the claims procedures used by FDIC-Corporate, *id.* at 32a-34a, citing *Kershaw*, 987 F.2d at 1210; *Nimon*, 975 F.2d at 247-248, but found that, in light of the informality of the FDIC's procedures, the adequacy of the process afforded any particular claimant cannot be determined until after those procedures have been invoked, Pet. App. 34a-35a.

ARGUMENT

1. Section 1821(f) of Title 12 of the United States Code governs the process by which the FDIC determines which claims are entitled to federal deposit insurance. Section 1821(f)(1) provides that, upon the liquidation, closing, or winding up of the

affairs of an insured depository institution, the FDIC, in its corporate capacity, "shall" make payment of the insured deposits "as soon as possible." 12 U.S.C. 1821(f)(1) (Supp. V 1993). Although "[t]he [FDIC], in its discretion, may require proof of claims to be filed," 12 U.S.C. 1821(f)(2) (Supp. V 1993), in the ordinary course the FDIC reviews a failed bank's accounts and notifies account holders sua sponte of its deposit insurance determinations. When the bank's records do not provide notice of a potential claim, however, the claimant must file a proof of claim to put the FDIC on notice and to permit the FDIC to make a payment determination.

Section 1821(f) also sets forth a framework for the resolution of disputes. The FDIC may resolve disputed claims "in accordance with regulations prescribed by the [FDIC] establishing procedures for resolving such claims." 12 U.S.C. 1821(f)(3)(A) (Supp. V 1993). In the alternative, "if the [FDIC] has not prescribed regulations establishing procedures for resolving disputed claims, the [FDIC] may require the final determination of a court of competent jurisdiction before paying any such claim." 12 U.S.C. 1821(f)(3)(B) (Supp. V 1993).[3] That

[3] The court below held that even if FDIC-Corporate had rejected a properly filed proof of claim for deposit insurance, petitioner could not obtain review of that decision in district court, but could instead seek review only in the court of appeals. That holding was consistent with the Fifth Circuit's view that the FDIC may finally resolve deposit insurance claims under Section 1821(f)(3)(A) even if it has not promulgated procedural regulations to guide its claims resolution process, and that review of the FDIC's final determinations lies exclusively in the courts of appeals under 12 U.S.C. 1821(f)(4) (Supp. V 1993). See *Kershaw*, 987 F.2d at 1208;

framework for dispute resolution comes into play only when there is a live dispute respecting payment of a claim. For there to be a dispute, the FDIC must have made a determination not to pay the amount desired by the claimant. Here, because petitioner

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Nimon, 975 F.2d at 243-244; accord *Abrams* v. *FDIC*, 938 F.2d 22, 24-25 (2d Cir. 1991).

The District of Columbia Circuit and the First Circuit (and the Third, Fourth, and Tenth Circuits in unpublished dispositions) have taken a contrary view. In their view, Section 1821(f) gives the FDIC a binary choice: It may promulgate regulations establishing procedures for administrative resolution of disputed claims and, under Section 1821(f)(3)(A), resolve deposit insurance disputes in accordance with those procedures, subject to appellate review; alternatively, if the FDIC has promulgated no regulations, it must submit disputed claims for resolution to "courts of competent jurisdiction" (*i.e.*, district courts), under Section 1821(f)(3)(B). See *Callejo* v. *RTC*, 17 F.3d 1497, 1499-1500 (D.C. Cir. 1994); *Massachusetts* v. *FDIC*, 47 F.3d 456, 457-458 (1st Cir. 1995); *Sekula* v. *FDIC*, No. 92-3263 (3d Cir. Jan. 12, 1993) (unpublished order transferring case to district court); *Abramovitz* v. *FDIC*, No. 93-2646 (4th Cir. May 12, 1994) (unpublished order transferring case to district court); *Treasurer of Laramie County* v. *FDIC*, No. 90-9549 (10th Cir. Apr. 18, 1991) (unpublished order transferring case to district court).

Both the FDIC and the Resolution Trust Corporation agree with the latter view and believe that, in the absence of regulations establishing administrative claims procedures, jurisdiction to resolve deposit insurance disputes resides in the district courts. The FDIC thus disagrees with the holding below that, even if FDIC-Corporate had finally rejected petitioner's claim, the district court would still have lacked subject matter jurisdiction. Petitioner, however, has not challenged that alternative holding. Petitioner's argument that FDIC-Corporate waived the right to require presentment of the deposit insurance claim would therefore not be sufficient, even if accepted, to warrant a reversal of the judgment of the court of appeals.

filed no proof of claim, FDIC-Corporate has made no determination whether petitioner should receive an insurance payment, and there is not yet any cognizable dispute.

Petitioner does not contest that claimants are required under the statute to file claims for deposit insurance with FDIC-Corporate. Moreover, petitioner concedes (Pet. 12) that, in this case, it did not file such a claim. Petitioner argues (Pet. 16-22), however, that under the facts of this case FDIC-Corporate should be deemed to have waived presentment. That argument is based on a misapprehension of both the applicable law and the facts of record.

a. Petitioner asserts (Pet. 21-25) that FDIC-Receiver entered a "general appearance" in state court and thereby waived any right that FDIC-Corporate might otherwise have had to object that it was neither presented with, nor otherwise made aware of, petitioner's purported deposit insurance claim. Contrary to petitioner's contention, however, the pleadings demonstrate that the FDIC entered its appearance in this case solely in its capacity as receiver for Guaranty. Pet. App. 23a-24a. As the district court correctly found, FDIC-Receiver's notice of removal and its amended answer made it "abundantly clear" that FDIC-Corporate never intervened, and that the FDIC was a party only in its receivership capacity. *Id.* at 24a.

It is well settled that the FDIC operates in two separate, legally distinct capacities.[4] In its corporate

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[4] See, *e.g.*, *FDIC* v. *Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991); *FDIC* v. *Condit*, 861 F.2d at 854; *FDIC* v. *McClanahan*, 795 F.2d 512, 516 (5th Cir. 1986); *Gunter* v. *Hutcheson*, 674 F.2d 862, 865 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

capacity, the FDIC functions as a bank regulator and insurer of bank deposits. 12 U.S.C. 1818, 1821(a) (Supp. V 1993). In that capacity, it has the authority to pay insured deposits (12 U.S.C. 1821(f)(1) (Supp. V 1993)), require proof of claims (12 U.S.C. 1821(f)(2) (Supp. V (1993)), and make final determinations respecting insurance coverage (12 U.S.C. 1821(f)(4) (Supp. V 1993)). When the FDIC acts as receiver, on the other hand, it represents a failed bank's estate and all of its component interests (creditors, depositors, and shareholders). 12 U.S.C. 1821(d) (Supp. V 1993). Like a trustee in bankruptcy, FDIC-Receiver administers only the assets of the receivership estate. 12 U.S.C. 1821(d)(2), 1821(i)(2) (Supp. V 1993). The FDIC in its receivership capacity therefore cannot waive rights held and exercised exclusively by FDIC-Corporate. Because FDIC-Corporate and FDIC-Receiver are distinct legal entities, it is not surprising that petitioner can cite no support for the proposition that FDIC-Corporate should be deemed to be on notice of legal claims made against FDIC-Receiver, or that FDIC-Receiver had an obligation to inform FDIC-Corporate that petitioner might later recharacterize its wrongful dishonor claim as one for deposit insurance.[5]

b. To the extent that petitioner argues (Pet. 11-12, 22) that FDIC-Corporate had actual knowledge

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[5] The latter contention is particularly unreasonable in light of FDIC-Receiver's position in this litigation that the standby letter of credit is not an insured deposit. Cf. *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) (standby letter of credit, backed only by an unsecured promissory note, is not an insured deposit, and beneficiary is not entitled to payment in preference over other creditors of failed bank).

of petitioner's deposit insurance claim from the inception of this suit, that argument is refuted by the record. Petitioner's complaint against Guaranty, a private financial institution, did not state a deposit insurance claim. When FDIC-Receiver intervened and removed the case to federal court, it correctly interpreted the complaint to assert solely a claim for wrongful dishonor against the receivership estate.[6] It was not until the pre-trial proceedings in 1991, two years after the case had been removed, that petitioner asserted for the first time that its letter of credit was an insured deposit. FDIC-Receiver immediately objected to that claim, pointing out that petitioner could make a deposit insurance claim only against FDIC-Corporate. On being joined in the suit, FDIC-Corporate asserted that the district court lacked jurisdiction because petitioner had not yet filed a proof of claim.

2. Petitioner argues (Pet. 15, 27-31) that requiring it to submit its deposit insurance claim for ad-

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[6] Petitioner argues (Pet. 17-18) that FDIC-Receiver has no authority to remove suits against it, and that the FDIC must therefore have intervened in the action in its corporate capacity to obtain removal. That argument is incorrect on two grounds. First, as the court of appeals explained, Pet. App. 24a n.6, FDIC-Receiver may remove if the lawsuit does not involve solely the interpretation of issues of state law. See 12 U.S.C. 1819(b)(2)(B) and (D) (Supp. V 1993). The court of appeals agreed with the magistrate judge that removal was justified in this case because petitioner's suit involved federal issues, Pet. App. 25a n.6, and petitioner has not raised in its petition for certiorari a challenge to that determination. Second, even if the magistrate judge had erred in permitting removal, that would not establish that FDIC-Corporate was involved in the lawsuit at the time of removal.

ministrative resolution in the absence of formal procedures to guide the administrative process amounts to a denial of due process. The court of appeals correctly rejected that claim as unripe. The constitutional sufficiency of the FDIC's deposit insurance claim resolution procedures is determined by reference to the framework established by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Because the FDIC utilizes informal procedures, however, the adequacy of the process afforded in a particular case is not susceptible to ex ante review. Cf. *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988) ("Given the 'essentially ad hoc, factual inquir[y]' involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'" (citation omitted)). If petitioner remains dissatisfied after it has submitted a claim to FDIC-Corporate, the reviewing court then will have an actual record against which to judge the adequacy of the claims review process. Review prior to that time would be premature. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985) (holding claim that county unconstitutionally took property through enactment of zoning ordinance premature, because developer had not sought a variance or exhausted state procedures for obtaining just compensation).

Petitioner's reliance on *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), is misplaced. *Coit* was not decided on due process grounds. Rather, this Court held that the statutory authority of the Federal Savings and Loan Insurance Corporation

FSLIC) could not reasonably be construed to permit it to impose a strict exhaustion requirement when the FSLIC's regulations contained no time limit on the period for administrative review. *Id.* at 586-587. This case does not concern the reasonability of an agency's regulations. Here, the statute clearly permits the FDIC to forgo promulgation of procedural regulations. See 12 U.S.C. 1821(f)(3)(B) (Supp. V (1993). That option is not, on its face, violative of due process, because agencies are not required by the Constitution to act solely through regulations. Instead, they may permissibly "establish policy on a case-by-case basis * * * through administration of agency programs." *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991).

Further, the Court found it relevant in *Coit* that the petitioner's claim for $113 million had been pending for 13 months, and that the FSLIC had yet to make even an initial determination. In this case, there has been no showing that the FDIC fails promptly to resolve deposit insurance claims. Unlike the petitioner in *Coit*, petitioner in the instant case has not yet submitted its claim for administrative resolution. See Pet. App. 34a-36a. If petitioner files a claim, and the FDIC fails within a reasonable time to make a determination, petitioner will have recourse to adequate administrative remedies. See 5 U.S.C. 706(1) ("[T]he reviewing court shall * * * compel agency action unlawfully withheld or unreasonably delayed.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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